United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1335

To be argued by
B. ALAN SEIDLER

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Pd S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

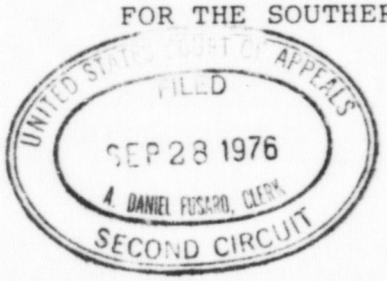
-against-

ANTHONY RUSSILLO,

Defendant-Appellant.

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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Title 18, United States Code, Federal Rules of Criminal Procedure

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ANTHONY RUSSILLO, Defendant-Appellant.	Docket No. 76 Cr. 377

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

I. Whether the evidence against appellant was sufficient as a matter of law.

II. Whether the voluntary statement by Peter T. Goodrich, Esq. constituted reversible error.

III. Whether the procedure whereby Francis Millow was held in contempt was so prejudicial as to constitute reversible error.

IV. Whether the dismissal of the Conspiracy charge created retroactive misjoinder as to the remaining substantive charge.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a conviction rendered on July 8, 1976, after jury trial in the United States District Court for the Southern District of New York (The Honorable Robert L. Carter) finding appellant guilty of one count of illegal gambling, in violation of 18 U.S.C. Section 1955 and 2 (Count Two).[1] Appellant Russillo was sentenced to a period of imprisonment of two years, all but five months of which was suspended.

B. Alan Seidler, Esq., was continued as counsel on appeal, pursuant to the Criminal Justice Act.

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[1]On defendant's motion Count One was dismissed at the close of the Government's case.

Statement of Facts

The appellant was arrested on February 10, 1976, and charged by way of indictment number S 76 Cr.141 (later superseded by indictment number S 76 Cr. 377[2]) with having committed offenses against the United States, to wit, a violation of Title 18, United States Code, Sections 1955 and 2. The appellant interposed a plea of not guilty at the time of his arraignment and notified the Court that he would appear Pro Se. The appellant did not make any pretrial motions, nor did he join in those made by other defendants in the case. The matter was scheduled for trial before the Hon. Robert L. Carter on the 26th day of April, 1976.

On the trial date the appellant informed the Court that because many of the issues involved were too complex for his understanding, he would like counsel to appear on his behalf. After finding the appellant to be "indigent" the Court assigned Bernard Alan Seidler, Esq. to represent Russillo during the course of all subsequent proceedings. On April 27, 1976, Mr. Seidler filed a Notice of Appearance with the Court, and the jury selection process began. The trial ended on the 7th day of May, 1976, the jury finding appellant guilty as charged on

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[2]The Indictment is B to appellant's index.

the second count of indictment number S 76 Cr.377. (The first count of said indictment having been dismissed on defendant's motion at the close of the Government's case). (1293-1296[3]).

At the time trial began, also named with this appellant as co-conspirators/defendants were thirteen (13) other individuals nine (9) of whom actually went to trial and were present for the verdict. There were three (3) others named as co-conspirators but not as defendants, as well as numerous other persons known and unknown to the Grand Jury who were classified as unindicted and unnamed co-conspirators.

During the course of the presentation of their case, it was the position of the government that a single conspiracy existed beginning on the 1st day of September, 1968, and continued up to the date of the filing of the indictment which involved a violation of the gambling laws of the United States by those named or referred to in the indictment. Consequently, evidence was introduced for approximately nine trial days dealing with the activities, statements and lives of all the other conspirators as well as appellant. Said evidence encompassed wire tap recordings, overheard conversations, lay and expert testimony, surveillance reports and photographs, seizures, etc. However, little of the total evidence involved

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[3]Numerals in parentheses refer to pages of the transcript of the trial.

appellant.

Mr. Russillo, through the introduction of evidence, was depicted as being involved in football betting in the Westchester County area in 1974. There was no evidence to indicate his football betting encompassed a time frame other than 1974. However, other evidence presented at trial indicated that other defendants, in various combinations, were involved in a policy operation from 1968 through 1972 in Bronx County, and in "numbers" in Westchester and Bronx Counties in 1974.

After the Court dismissed the Conspiracy charge, appellant was involuntarily placed in the position of having the jury decide the limited issue of his particular guilt or innocence on the substantive charge after having heard prejudicial and voluminous evidence as to other defendants' involvement in totally separate and distinct criminal activity, and after the Government's chief witness, Francis Millow, took the Fifth Amendment and was subsequently held in contempt after hearing the name of appellant's co-defendant, Henry Bucci.

On July 8, 1976, appellant was sentenced by the Hon. Robert L. Carter to a period of imprisonment of two years, all but five months of which was suspended - the nineteen months to be covered by a supervised probationary period. Upon appellant's motion, the sentence was stayed pending appeal, the Court having found that, in effect, the issue of retroactive

misjoinder caused by the defendant's having to sit through a two week "conspiracy" trial involving multiple defendants, only to have that charge dismissed, and the jury then required to deliberate solely on the substantive charge, was a meritorious issue for appeal.

I. THE EVIDENCE AGAINST APPELLANT WAS NOT SUFFICIENT AS A MATTER OF LAW.

It is recognized in this jurisdiction that an Appellate Court may set aside a verdict if it is not supported by legally sufficient evidence. United States v. Masiello, 235 F.2d 279 (2d Cir. 1955); cert.denied, 352 U.S. 882 (1956); United States v. Sherman, 171 F.2d 619 (2d Cir. 1948), cert.denied, 337 U.S. 931 (1949).

In this case the appellant concedes for the purpose of this appeal that he is a gambler, that his particular football betting operation existed for in excess of thirty (30) days, and that he grossed in excess of the statutory requirement in a particular day. However, it is the appellant's contention that there was not legally sufficient evidence for the jury to find that there were five or more people involved in the management, etc., of his particular football operation. There was no testimony or other evidence linking this appellant to the "Yanacelli" numbers or policy operation in the Bronx from 1968 through 1972. Nor was there evidence linking Mr. Russillo to numbers or policy operation in either 1973 or 1974, in Westchester or the Bronx. The Government asked the jury to believe that the intercepted conversation of November 18, 1974, between Mr. Russillo and Mr. Millow would indicate otherwise, but an analysis of that

tape demonstrates that no such interpretation can be deduced. The word "numbers" was mentioned, but only in reference to wins and losses for the week on sports betting, not in the context of a policy operation.

The seizures from the home of Mr. Russillo on December 31, 1974, cannot support the conclusion that Russillo's involvement extended beyond football wagers in 1974. Agent Harker testified for the Government and stated that he examined the betting slips seized from Russillo as well as those seized from others in the case - and they were different in form (891). Agent Harker did examine Mr. Russillo's ledgers and, from that document, it is evident that the appellant did have a partner in this particular enterprise, and that was Joseph Millow (874[4]). However, that ledger was unable to reveal whether anyone else was involved with the appellant and Millow in the management, etc. of that gambling operation. (888-9)(877).

Returning to the November 18, 1974 tape, the Government asked the jury to believe that it indicates that Mr. Russillo was a partner not only of Mr. Joseph Millow, but also of Mr. Colletti. An analysis of that tape demonstrates otherwise, and clearly shows Mr. Colletti to be a bettor with Mr. Russillo - a fact the jury had to believe if they acquitted Mr. Colletti.

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[4] Joseph Millow a/k/a Pop.

The November 23, 1974 tape is the clearest and most persuasive evidence this Court has to demonstrate that the appellant could not have been involved in a gambling enterprise that met all the statutory requirements. There, although Mr. Russillo acknowledges knowing Mr. Bucci and Mr. Variano, Mr. Russillo says that Bucci is Pete's man and that Pete's supposed to get him out of jail. Nowhere can it be inferred from this conversation that Mr. Russillo and Mr. Millow are involved in a gambling operation with Mr. Bucci and Mr. Variano. This conclusion is verified by the testimony of Ms. David who did not mention Mr. Russillo as being, in any way, involved with the Bucci/Variano operation (632-685).

Continuing with the tape of November 23rd, the following conversation ensues between Mr. Millow and Mr. Russillo:

"MILLOW: Ah, they try to hang ya - den da - now Peepers[5], Peepers wants to go together - fuck you! (snicker), you want to get him out? Huh...

RUSSILLO: You, Peepers wants to go together. What does he want to go together, there is only one week left with the ticket.

MILLOW: Yeah, well next year he said.

RUSSILLO: Next year?

Tape transcript, p. 5

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[5]Peter Variano a/k/a Peepers.

Clearly, this conversation indicates that Mr. Russillo was not involved with Mr. Variano or his partner, Mr. Bucci, in football betting in 1974. And, if there was no such involvement there was no other lawful evidence the jury had in order to reach the conclusion that Mr. Russillo was involved with the number mandated by statute.

II. THE VOLUNTARY STATEMENT BY PETER T. GOODRICH CONSTITUTED REVERSIBLE ERROR.

Peter T. Goodrich, a Government witness and an assistant district attorney in Westchester County, gratuitously brought to the attention of the trial jury that Mr. Russillo had a "State matter" pending in a local court. (1087). That remark was not called for by the question, as Judge Carter pointed out to the witness (1087). However, even after defense counsel strenuously objected, the Court still did not give an immediate curative charge to the jury, nor did the Judge order the statement stricken from the record.

The law is settled that a prosecutor may not prove or give evidence as to a defendant's bad character unless and until the defendant has introduced evidence as to his good character. People v. Sharp, 107 N.Y. 427,457, 14 N.E. 319,338-339. By Mr. Goodrich informing the jury that Mr. Russillo had another local matter involving these same tapes, the net effect is to cast doubt as to the latter's character for the purpose of this prosecution. This is highlighted by the fact that at no time did the appellant introduce evidence on his own behalf.

In cases involving various offenses and circumstances, where police or peace officers, while testifying, have made

improper voluntary statements which were not the subject of inquiry and were not admissible in evidence, the courts have held that such error, either alone or in conjunction with other errors committed during the trial was reversible. Hermansky v. United States, 7 F.2d 427 (CA 8th Neb. 1925); Mattson v. United States, 7 F.2d 427 (CA 8th Minn. 1925); United States v. Campanaro, 63 F. Supp. 811 (DC Pa. 1945).

Here, the error is even more blatant than in the cases cited, for it was an assistant district attorney who made the prejudicial utterance. And, Judge Carter took no remedial action as far as this trial jury was concerned.

III. THE PROCEDURE WHEREBY FRANCIS MILLOW WAS HELD IN CONTEMPT WAS PREJUDICIAL TO APPELLANT.

Mr. Francis Millow, indicted as a co-conspirator in this case, was called as a witness on behalf of the Government (565). After a few brief introductory questions and answers, Mr. F. Millow refused to state whether he knew a man named Hank Bucci[6] on Fifth Amendment grounds. After the witness was shown a document marked as Government's exhibit 17, and an unsuccessful attempt at the declaration of a mistrial (566), then and only then was the jury excused.

In the absence of the jury, the Court explained to the witness the scope and type of immunity he had been given (567-8), and gave Mr. Millow several minutes to think over his position (569). Meanwhile defense counsel attempted to raise a point of law (568) but such attempt was aborted by the Court, and the jury was returned to the courtroom (569).

Upon being re-questioned in the presence of the jury, the witness again refused to testify and was summarily held in contempt (570), pursuant to Rule 42.[7] The Court then granted the

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[6] Co-defendant/Co-conspirator Henry Bucci

[7] Title 18, United States Code, Federal Rules of Criminal Procedure.

Government's request that a marshal be called (570), and the jury was again excused (571).

This appellant does not question the basic authority of the Court to act as it did in holding Mr. Millow's conduct contemptuous. Rather, Mr. Russillo maintains that it was the re-questioning of Mr. Millow in the presence of the jury and the actual citing for contempt that was improper and prejudicial under the circumstances. The Court, after being given every indication by che witness that he would not testify even with a grant of immunity, should not have been so insensitive as to allow Mr. Millow to repeat his performance in the presence of the jury. The Judge's conduct and remarks compounded the prejudicial impact. The contempt proceeding could just as easily have been held outside the presence of the jury. It had the unavoidable impact of creating the implication that the witness indeed had damaging evidence to give against the defendants generally, and/or one of the defendants actually "got" to the witness. This is especially true because of the "organized crime" nature of the charge, who was prosecuting the case, and the ethnic background of the appellant.

Particularly in a jury trial, the Court should exercise restraint and caution because of the possible prejudicial consequences of its intervention. Young v. United States, 346 F.2d 793 (CA D.C. 1965). It should always keep in mind the possible

if not probable, effect of any statement which it may make in the course of a trial. United States v. Link, 202 F.2d 592 (C.A. N.J. 1953). The improper remarks of a trial judge constitute reversible error where they influence the jury and prejudice it against the defendant. United States v. Agnilo, 153 F.2d 247 (C.C.A N.J. 1946); and, the criterion for prejudice is the probable effect such remarks or conduct has upon the jury. Davis v. State of North Carolina, 196 F.Supp. 488, reversed 310 F.2d 904 (D.C.N.C. 1961)..

There can be no doubt that because of the pretrial status of the witness, and the sensitive nature of the prosecution, that the Court's action and remarks had a serious prejudicial effect upon the jury and a reversal of the conviction should, therefore, ensue. Could the Judge's actions with regard to this witness have been less prejudicial had it held appellant's lawyer in contempt in the presence of the jury? See: Merks v. United States, 163 F.2d 598 (C.C.A. Alaska 1947); United States v. Kelly, 314 F.2d 461 (C.A. Ohio 1963). This appellant does not believe so and, therefore, looks to this Court for relief.

IV. THE DISMISSAL OF THE CONSPIRACY CHARGE AGAINST THE APPELLANT CREATED RETROACTIVE MISJOINDER AS TO THE SUBSTANTIVE COUNT.

At the conclusion of the Government's case, this appellant moved for a Judgement of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. After arguments for and in opposition to the motion, the Court dismissed the Conspiracy charge against all the defendants. The Court held that there was a variance in proof as to count one (1293) and that said variance was prejudicial[8] (1294); that there were at least two conspiracies or time-frames and probably three proven at trial, and they were separate and distinct (1293).

The Court further stated that it was certain that this appellant was prejudiced by the variance in proof (1294) and having to sit through lengthy testimony which in no way concerned him (1294). Curiously, the Court did send the substantive count to the jury saying that it was not concerned with the spill-over effect as regards to the hearsay testimony (1294-96). However, the Judge never mentioned the problem involved in submitting count two because of retroactive misjoinder (1293-96);

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[8]Emphasis added.

that is, the danger that the appellant would be swept into a net of convictions because of the number of others involved and tried with him.

In this case the only cement which held the substantive charges against the various defendants together for the purpose of a mass trial was the charge of conspiracy.[9] Once that element was dissolved we are left with the dilema of what should occur when it develops from the evidence at trial that the joinder was improper. The leading case on the subject is Schaffer v. United States, 362 US 511, 80 S.Ct. 945 (1960), which in affirming the convictions, held that the dismissal of the conspiracy count does not automatically establish misjoinder; rather, prejudice must be demonstrated. However, here the Court found that as to the conspiracy count this appellant was prejudiced by the variance in proof (1294), and having to sit through lengthy testimony which in no way involved him (1294). Consequently, if this prejudice did exist, must it not necessarily extend to the substantive count as well? For the appellant was still required to sit through the lengthy trial of others as to separate and distinct offenses that did not involve him. If prejudice existed because of the nature of the trial as to the first count, it must necessarily exist as to the second count.

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[9]See: Title 18, United States Code, Rule 8A and B of the Federal Rules of Criminal Procedure.

The question is not whether the jury's verdict was correct, regardless of error, but what effect the error had or reasonably may have had upon the jury's decision. Kotteakos et.al. v. United States, 328 U.S. 750 (1946). That each defendant has a "substantial right" not to be tried en masse for a conglomeration of distinct and separate offenses committed by others. Id. at 775. For numbers are vitally important in criminal trials. Id. at 772. If one violates the law and others also partake in similar activity - "criminal though it may be - it is not the criminality of mass conspiracy.' 'He does not invite mass trial by his conduct.' "Our system should not tolerate it." Id. at 773.

Here, the Court in dismissing the conspiracy count created a retroactive misjoinder as to the substantive count, and because of the nature of the prejudice found as to the former it must necessarily have been existent as to the latter. This is sufficient to take the case out of the realm of the Schaffer decision, and require a reversal of appellant's conviction.

CONCLUSION

For the foregoing reasons, the conviction on Count Two must be reversed and dismissed, or remanded for retrial.

Respectfully submitted,

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